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14 [Additional counsel appear on signature page]

15 **UNITED STATES DISTRICT COURT**

16 **DISTRICT OF NEVADA**

17 Cung Le, Nathan Quarry, Jon Fitch, Brandon  
18 Vera, Luis Javier Vazquez, and Kyle  
19 Kingsbury on behalf of themselves and all  
20 others similarly situated,

21 Plaintiffs,

22 vs.

23 Zuffa, LLC, d/b/a Ultimate Fighting  
24 Championship and UFC,

25 Defendant.

26 Case No.: 2:15-cv-01045 RFB-(PAL)

27 **PLAINTIFFS' MOTION TO**  
**CHALLENGE PRIVILEGE**  
**DESIGNATION**

28 **REDACTED PUBLIC COPY**

1 Pursuant to Section 11 of the Revised Stipulation and Protective Order issued by this Court on  
2 February 10, 2016 (ECF No. 217), Plaintiffs Cung Le, Nathan Quarry, Jon Fitch, Brandon Vera, Luis  
3 Javier Vazquez, and Kyle Kingsbury on behalf of themselves and all others similarly situated  
4 (collectively, “Plaintiffs”) hereby challenge the designation by Defendant Zuffa, LLC, d/b/a Ultimate  
5 Fighting Championship® and UFC® (“Defendant” or “Zuffa”) of the document bearing the file name  
6 MMERSCH00066967 (the “Challenged Communication”) as protected by the attorney-client  
7 privilege.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 The document at issue in this motion, MMERSCH00066967, is [REDACTED]  
11 [REDACTED]  
12 [REDACTED]. *See* Rayhill Declaration, Ex. 1, MMERSCH00066967.  
13 The email does not concern any legal issues, rights or remedies, nor does it seek or provide any legal  
14 advice. The sole concern of this document is [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED] [REDACTED]  
18 [REDACTED] Thus, Zuffa cannot  
19 carry its burden of showing that this email was made for the purpose of obtaining or providing legal  
20 advice.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] Were Zuffa allowed to shield these types of  
16 communication, Plaintiffs would be deprived of crucial evidence.

17 The document was produced to Plaintiffs as part of a small exchange of sample documents that  
18 was thoroughly reviewed by Defendant's counsel for privilege, a process which was proffered by  
19 Defendant as the source of the significant delay in providing the sample to Plaintiffs. The exchange  
20 involved a small number of documents (2,000), with ample time for review—review which Defendant's  
21 counsel repeatedly stated they needed to carry out before they would produce the documents. Indeed,  
22 many of the documents produced in this sample were heavily redacted, including many communications  
23 to or from the sender and/or recipients of this email. Any claim that this document was inadvertently  
24 produced must fail because it is clear that Defendant's counsel put attorney's eyes on every document  
25 in this sample. [REDACTED]

26 [REDACTED] Any attorney reviewing this document would have given it close scrutiny.  
27 The logical conclusion is that the reviewing attorney decided that the document has a pure business  
28 purpose and is therefore not privileged. This Court should reach the same conclusion.

1 **II. BACKGROUND**2 **A. Factual Background.**

3 On April 25, Zuffa provided Plaintiffs with a sample of 2,000 documents that were pulled from  
 4 the so-called “Remainder Set” of documents which did not hit on search terms proposed by Zuffa.<sup>2</sup>  
 5 1,500 of these documents *did* hit on Plaintiffs’ search terms and 500 did not hit on Plaintiffs’ search  
 6 terms. Plaintiffs conducted a review of the documents and determined that many were responsive to  
 7 Plaintiffs’ Requests for Production and relevant to their claims, a point which Plaintiffs sought to  
 8 emphasize in the Joint Status Report (“JSR”) (ECF No. 244, at 19-20) and at the upcoming Status  
 9 Conference with the Court. Accordingly, in one of the drafts of the JSR that Plaintiffs exchanged with  
 10 Zuffa before filing with the Court, Plaintiffs identified several documents that are responsive and  
 11 relevant, including MMERSCH00066967. *See* Rayhill Declaration, Ex. 2, Plaintiffs’ Draft of JSR,  
 12 4/28/16 11:03 pm, at 18. After Plaintiffs identified and discussed the Challenged Communication in  
 13 their draft of the JSR as provided to Zuffa, Zuffa purported to “claw back” the Challenged  
 14 Communication “pursuant to Section 11 of the Protective Order” (ECF. No. 217), asserting it is  
 15 protected by the attorney-client privilege and was “inadvertently produced.” *See* Rayhill Declaration,  
 16 Ex. 3, Lynch Email to Plaintiffs, 4/29/16, 8:50 am. Zuffa demanded that Plaintiffs remove the  
 17 Challenged Communication and any discussion of its content from the JSR. Plaintiffs agreed to comply  
 18 with Defendant’s request due to the timing of the JSR filing, but stated their intention to challenge the  
 19 clawback and privilege designation. In response, Defendant took the position that, although Defendant  
 20 purported to produce the Challenged Communication as “Highly Confidential” under the Protective  
 21 Order and purported to claw it back under the Protective Order, Plaintiffs’ right to challenge such  
 22 actions does not vest unless or until Defendant “formally produce[s] and/or list[s]” the Challenged  
 23 Communication on Zuffa’s privilege log. *See* Rayhill Declaration, Ex.4, Lynch Email to Plaintiffs,  
 24 4/29/16, 10:16 am.

25  
 26 <sup>2</sup> Zuffa maintains that its search terms are adequate and that any documents which do not yield hits for  
 27 its search terms are not relevant. Plaintiffs dispute Zuffa’s assertion and believe that Zuffa’s search  
 28 terms result in a set of documents that is far too narrow and excludes many relevant documents. In an  
 effort to resolve this dispute, the parties agreed to run Plaintiffs’ search terms against the Remainder  
 Set. Zuffa then produced a sample of 2,000 documents from the remainder set, including 1,499  
 documents that were responsive to Plaintiffs’ search terms.

**B. The Challenged Communication Concerns Zuffa's Compensation of Fighters, Which is Clearly Material to This Case.**

Plaintiffs allege that Zuffa suppressed compensation for Elite Professional MMA Fighters. Consolidated Class Action Complaint (“CAC”), ECF. No. 208, ¶1. Zuffa’s scheme was two-fold: it illegally acquired and maintained monopoly power in the market for promoting live Professional MMA Events, and illegally acquired and maintained monopsony power in the market for the services of Elite Professional MMA Fighters. *Id.* Zuffa used its power in these two markets to exercise control over Elite Professional MMA Fighters and to suppress their compensation. *Id.*

**C. The Challenged Communication Evidences the Inadequacy of Defendant's Search Term Proposal**

In addition to its probative value to Plaintiffs' claims, the Challenged Communication also evidences the inadequacy of Defendant's search term proposal. The Challenged Communication was produced as part of a sample set of documents which hit on Plaintiffs' proposed search terms, but not Defendant's proposed terms. Defendant has held out its search terms as "reasonable" (e.g., ECF No. 218 at 8), but Plaintiffs have shown that Defendant's proposal is only targeted at finding documents [REDACTED] E.g., First Declaration of Charles Kellner, ECF No. 221 at 5-7. The Challenged Communication shows that Defendant's proposed terms not only fail to capture documents [REDACTED]

[REDACTED] The clawback of the Challenged Communication occurred only after Plaintiffs identified the document in a filing to be lodged with the Court and after Plaintiffs argued that the Challenged Communication demonstrated the failure of Defendant’s search terms to capture emails discussing [REDACTED]. However, the clawback should not be a basis to

<sup>3</sup> The timing of the clawback (after Plaintiffs demonstrated the Challenged Communication's probative value), coupled with Defendant's position that it could claw back responsive samples under the Protective Order, but that Plaintiffs cannot use the Protective Order to challenge such clawbacks, seems at best highly irregular.

1 remove the document from the Court's review of the adequacy of Defendant's search terms. Even if the  
 2 Challenged Communication is privileged—and it is clearly not—the responsiveness and relevance of  
 3 the document nevertheless evidences the inadequacy of Defendant's search term proposal.

4 **III. ARGUMENT**

5 **A. The Attorney-Client Privilege Does Not Apply if no Legal Advice is Sought or  
 6 Provided.**

7 Zuffa bears the burden in demonstrating that the disputed communication is protected by the  
 8 attorney-client privilege because “[t]he privilege stands in derogation of the public's 'right to every  
 9 man's evidence' and as an obstacle to the investigation of the truth, and thus it ought to be strictly  
 10 confined within the narrowest possible limits consistent with the logic of its principle.” *United States v.*  
 11 *Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (quotation marks and citations omitted). Courts in the Ninth  
 12 Circuit apply an eight-part test to determine whether the privilege applies: “(1) where legal advice of  
 13 any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the  
 14 communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are, at that  
 15 instance, permanently protected, (7) from disclosure by the client or by the legal advisor, and (8) unless  
 16 the protection is waived.” *Elan Microelectronics Corp. v. Pixcir Microelectronics Co.*, 2013 U.S. Dist. LEXIS  
 17 114788, at \*11 (D. Nev. Aug. 13, 2013). “‘The party asserting the privilege bears the burden of proving  
 18 each essential element.’” *Georgia-Pacific LLC v. Officemax Inc.*, 2014 U.S. Dist. LEXIS 89735, at \*8,  
 19 2014 WL 2942833 (N.D. Cal. June 30, 2014) (quoting *Ruehle* at 608).

20 “The attorney-client privilege . . . protects communications seeking legal advice, not business  
 21 advice.” *In re Currency Conversion Fee Antitrust Litig.*, 2002 U.S. Dist. LEXIS 21196, at \*4, (S.D.N.Y.  
 22 Nov. 1, 2002); see also *United States v. Motorola, Inc.*, *supra*, 1999 U.S. Dist. LEXIS 22864, at \*9  
 23 (“communications made by and to a lawyer with respect to business matters, management decisions, or  
 24 business advice are not protected by the privilege”). Even where legal advice was necessary in order to  
 25 implement a transaction, it does not follow that communications concerning the business rationale and  
 26 strategy for the transaction are privileged. *See Schlicksup v. Caterpillar, Inc.*, 2011 U.S. Dist. LEXIS  
 27 92827, \*17 (C.D. Ill. Aug. 19, 2011) (“Many of the documents at issue involve devising, presenting, and  
 28 implementing the business transaction, not the providing confidential legal advice. [sic] Legal advice

1 was of course necessary to implement parts of the plan, but that does not protect the entire transaction  
 2 under the attorney-client privilege.”); *Neuder v. Battelle Pac. Northwest Nat'l Lab.*, 194 F.R.D. 289, 292  
 3 (D.D.C. 2000) (“when the legal advice is merely incidental to business advice, the privilege does not  
 4 apply”).

5 This is especially so where, as here, the attorneys are in-house counsel. *See, e.g., Oracle Am., Inc.*  
 6 *v. Google Inc.*, 2011 U.S. Dist. LEXIS 121446, at \*23, (N.D. Cal. Oct. 20, 2011) (“a party attempting to  
 7 demonstrate that an internal communication involving in-house counsel deserves privileged status must  
 8 make a clear showing that the speaker made the communication for the purpose of obtaining or  
 9 providing *legal advice*”) (emphasis in original); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 628 (D. Nev.  
 10 2013). (“in-house attorneys are often very involved in the company’s business, but the attorney-client  
 11 privilege does not apply when the attorney is providing strictly business advice”).

12 Zuffa cannot meet the first two elements of privilege discussed in *Elan Microelectronics Corp.* ■■■■■

13 ■■■■■  
 14 ■■■■■  
 15 ■■■■■ There are no legal issues, rights or remedies discussed or implicated. No legal advice is sought  
 16 or provided. And if no legal advice was provided or sought, then ■■■■■

17 ■■■■■ *See, In re Currency Conversion Fee Antitrust Litig.*, *supra*, at \*4.

18 ■■■■■  
 19 ■■■■■  
 20 ■■■■■  
 21 ■■■■■ No legal advice was sought or given. Attorney-client  
 22 privilege does not apply to this document.

23 **B. If Both Legal and Business Advice are Sought or Given, the Primary Purpose Must  
 24 be Legal Advice in Order for Attorney-Client Privilege to Apply.**

25 Even if one were to concede—which Plaintiffs do not—that there is a legal component to the  
 26 email, the document would still not be privileged because Zuffa cannot show that the primary purpose  
 27 of the email was to obtain legal advice. When documents contain both business and legal advice, Courts  
 28 in the Ninth Circuit apply the “primary purpose” test: “when a party seeks to apply the attorney-client

1 privilege to a communication involving in-house counsel, it must demonstrate that the ‘primary  
 2 purpose’ of the communication was to obtain or provide legal advice.” *Phillips v. C.R. Bard, Inc., supra*,  
 3 at 628. *Accord United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (“[i]n  
 4 order to show that a communication relates to legal advice, the proponent of the privilege must  
 5 demonstrate that the ‘primary purpose’ of the communication was securing legal advice”); *Fox v.*  
 6 *Shinseki*, 2013 U.S. Dist. LEXIS 82087, at \*3-4 (N.D. Cal. June 10, 2013). (“Regarding legal advice, the  
 7 party seeking to withhold discovery must prove that the communications it seeks to protect were made  
 8 primarily for the purpose of obtaining legal advice.”); *Fosbre v. Las Vegas Sands Corp.*, 2016 U.S. Dist.  
 9 LEXIS 5422, at \*24 (D. Nev. Jan. 14, 2016) (“where the primary purpose of the communication is to  
 10 discern the legal ramifications of a potential course of action, that communication is for a ‘legal  
 11 purpose.’ Conversely, a communication is not privileged where the principal purpose for making the  
 12 communication was not to secure legal advice but to secure what was essentially a business service.”).

13 Here, there is no mention of any legal issues, rights or remedies, or of any law or statute. [REDACTED]

14 [REDACTED]  
 15 [REDACTED] Even if one were  
 16 to argue that this somehow implicates a legal purpose, it cannot be said that the primary purpose of the  
 17 email is to obtain or to give legal advice. The attorney-client privilege does not apply to this document.

18 **C. To the Extent that Privilege Attached to the Challenged Communications Zuffa Has  
 19 Waived It By Failing to Describe the Basis for Privilege.**

20 Under Federal Rule of Civil Procedure 26(b)(5)(A), a party seeking to withhold information on  
 21 the basis of privilege must “(i) expressly make the claim; and (ii) describe the nature of the documents,  
 22 communications, or tangible things not produced or disclosed—and do so in a manner that, without  
 23 revealing information itself privileged or protected, will enable other parties to assess the claim.” Zuffa  
 24 did expressly make the claim on April 29, but it failed to provide any information which would enable  
 25 Plaintiffs to assess the claim except that the document was purportedly “inadvertently produced” and  
 26 “protected from disclosure under the attorney-client privilege.” Rayhill Decl., Ex. 3, Lynch Email to  
 27 Plaintiffs, 4/29/16, 8:50 am. By failing to provide the information required by the Federal Rules, Zuffa  
 28 has waived privilege for this document. *Bowne of New York City Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474

(S.D.N.Y. 1993) (a party who fails to “provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege” risks rejection of his claim); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d at 473 (rejecting “general allegations of privilege ...not supported by information provided”); *Gail v. New Eng. Gas Co.*, 243 F.R.D. 28, 33 (D.R.I. 2007) (“failure by the party claiming privilege to adequately describe the documents at issue, to sufficiently explain the basis for the privilege, or to assert the privilege in a timely manner, may be grounds for rejecting the claim”).

#### IV. CONCLUSION

Plaintiffs have shown that MMERSCH00066967 is responsive and relevant to its claims, and that the document is not privileged. For these reasons and for the reasons set forth above, Plaintiffs respectfully ask the Court to order Zuffa to withdraw the privilege designation for MMERSCH00066967, produce the document in full for all uses in this litigation, and consider the document in assessing the adequacy of Zuffa’s search term proposal.

Dated: May 6, 2016

Respectfully Submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of May, 2016 a true and correct copy of **PLAINTIFFS' MOTION TO CHALLENGE PRIVILEGE DESIGNATION—LODGED UNDER SEAL** was served via email on all parties or persons requiring notice.

By: /s/ Kevin E. Rayhill